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12 **UNITED STATES BANKRUPTCY COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 **In re:**

16 **PG&E CORPORATION,**

17 **- and -**

18 **PACIFIC GAS AND ELECTRIC**
19 **COMPANY,**

20 **Debtors.**

21 Case Nos. 19-30088 (DM)

22 (Lead Case) (Jointly Administered)

23 Chapter 11

24 **DEBTORS' BRIEF REGARDING UTILITY**
FUNDED DEBT CLAIMS' ENTITLEMENT TO
MAKE-WHOLE PREMIUMS AND JOINDER
OF PG&E SHAREHOLDERS

25 Date: January 14, 2019

26 Time: 10:00 a.m. (Pacific Time)

27 Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

28 **Opposition Deadline:** December 20, 2019

1 PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the “**Utility**”),
2 as debtors and debtors in possession (collectively, the “**Debtors**”) in the above-captioned chapter 11
3 cases (the “**Chapter 11 Cases**”), respectfully submit this Brief Regarding the Utility Funded Debt
4 Claims’ Entitlement to Make-Whole Premiums. For the reasons set forth herein, the Class 3B creditors
5 under the Debtors’ Plan (as defined below) that hold Utility Funded Debt Claims (the “**Noteholders**”)
6 are not entitled to any make-whole or other premiums as part of their allowed claims because: (i) no
7 such premiums are payable under the relevant indentures; and (ii) even if otherwise payable under the
8 indentures, any such premiums are disallowed under section 502(b)(2) of the Bankruptcy Code as
9 unmatured interest.

10 The PG&E Shareholders¹ join this Brief and reserve the right to participate in argument of the
11 matter.

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22 ¹ The PG&E Shareholders are the entities identified on Exhibit A to the *Fourth Amended Verified Statement Of Jones Day Pursuant To Federal Rule Of Bankruptcy Procedure 2019*, ECF 4366, excluding Fidelity Management & Research Company, on behalf of certain funds and accounts, Monarch Alternative Capital LP, on its own behalf and on behalf of its advisory clients, and Paulson & Co., Inc., on behalf of certain funds and accounts. The PG&E Shareholders are acting in their individual capacities but authorized the filing of this single submission for the purpose of administrative efficiency. Each of the PG&E Shareholders is expressing its independent views, and counsel does not have the actual or apparent authority to obligate any one entity to act in concert with any other entity with respect to PG&E equity securities. The PG&E Shareholders have not agreed to act in concert with respect to their respective interests in PG&E equity securities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

The Utility Senior Notes, on an aggregate basis, bear interest at rates that exceed current market rates. Accordingly, the Debtors' Joint Chapter 11 Plan of Reorganization dated November 4, 2019, ECF No. 4563 (the "Debtors' Plan"),² provides for the Debtors to refinance twenty-nine series of Utility Senior Notes issued between 2004 and 2018 (the "Notes") with new market-rate debt, thereby saving over \$800 million in comparison to the plan proposed by the Ad Hoc Committee of Senior Noteholders and the Tort Claimants Committee that reinstates substantially all of the Notes. Under the Debtors' Plan, the Noteholders will receive cash payments equal to the full principal amount of the Notes, plus all interest accrued prior to the Petition Date at the applicable contract rates, and postpetition interest at the federal judgment rate.³

The Noteholders, however, will *not* receive under the Debtors' Plan, nor are they entitled to receive, payment of more than \$5.1 billion⁴ in Make-Whole Premiums (as defined below) claimed by the Noteholders. This is appropriate for two reasons. First, no Make-Whole Premiums are payable under the terms of the Indentures. The Indentures provide for Make-Whole Premiums only when the Utility redeems the Notes (*i.e.*, pays them off), prior to their maturity. The commencement of these Chapter 11 Cases automatically accelerated the maturity of the Notes, making the principal immediately due and payable on the Petition Date. Thus, payment of the Notes under the Debtors' Plan will occur *after* their maturity and, therefore, no Make-Whole Premiums are payable under the plain language of the Indentures.

This plain language reading of the Indentures is confirmed by their different treatment of defaults resulting from a bankruptcy filing and defaults for other reasons. Upon a bankruptcy default, the outstanding principal—but not any premium—becomes immediately due and payable. In contrast, upon a default for other reasons, the principal *and any premium* becomes due and payable. This

² Capitalized terms used but not defined in this Brief have the meanings given in the Debtors' Plan.

³ The parties have separately briefed the issue as to the appropriate rate of postpetition interest on allowed unsecured claims, including the Allowed Utility Funded Debt Claims.

⁴ The actual amount of the Make-Whole Premiums at issue is subject to change, for reasons explained *infra* note 9.

1 distinction makes clear that the Noteholders simply did not bargain for the ability to recover Make-
2 Whole Premiums in the context of a chapter 11 filing and automatic acceleration of the Notes.

3 *Second*, even if Make-Whole Premiums were not precluded by the terms of the Indentures,
4 they nevertheless would be disallowed as “unmatured interest” under section 502(b)(2) of the
5 Bankruptcy Code. The Indentures make clear that the Make-Whole Premiums were intended to
6 compensate the Noteholders for interest payments they expected to receive in the future. However
7 characterized, the Make-Whole Premiums are nothing more than lump-sum payments of interest that
8 have not yet matured—precisely the type of claim disallowed under section 502(b)(2) of the
9 Bankruptcy Code. Accordingly, neither the relevant Indentures nor the Bankruptcy Code entitle the
10 Noteholders to any Make-Whole Premiums as part of their Allowed Utility Funded Debt Claims.

11 **II. JURISDICTION**

12 This Court has jurisdiction to consider these issues pursuant to 28 U.S.C. §§ 157 and 1334; the
13 *Order Referring Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General Order 24 (N.D.
14 Cal.); and Rule 5011-1(a) of the Bankruptcy Local Rules for the United States District Court for the
15 Northern District of California.

16 **III. BACKGROUND**

17 **A. The Indentures and Notes**

18 Between 2004 and 2018, the Utility issued twenty-nine series of Notes with a total principal
19 amount of approximately \$17.5 billion, all of which were outstanding on the Petition Date. The Notes
20 are governed by one of three base indentures and, in most cases, a specific supplemental indenture
21 (collectively, the “**Indentures**”). For the Court’s convenience, Appendix A, attached hereto, provides
22 a list of each series of Notes along with their stated maturity dates, principal amounts, interest rates,
23 as well as each Note’s governing indenture(s).

24 The Indenture dated April 22, 2005 (“the **2005 Base Indenture**,” attached as Exhibit 1) forms
25 the foundation for most of the Notes and alone governs the first series of Notes set forth in Appendix
26 A.⁵ Pursuant to Section 3.01 of the 2005 Base Indenture, the Utility issued twenty-four additional

27 ⁵ Although originally established on March 23, 2004, the 6.05% Notes due March 1, 2034 (the
28 “**6.05% Notes**”) were “continued under” the 2005 Base Indenture and, accordingly, are “governed
by and subject to the provisions” of the 2005 Base Indenture. Ex. 1 §§ 4.01(a), 4.01(e), 4.02(d).

1 series of Notes by executing various supplemental indentures between 2007 and 2017 (each, a
 2 “**Supplemental Indenture**”).⁶ In 2017 and 2018, the Utility entered into two new base indentures—
 3 the Indenture dated November 29, 2017 (the “**2017 Base Indenture**,” attached as Exhibit 5), and the
 4 Indenture dated August 6, 2018 (“**2018 Base Indenture**,” attached as Exhibit 6,⁷ and together with
 5 the 2005 Base Indenture and 2017 Base Indenture, the “**Base Indentures**”). The 2017 Base Indenture
 6 governs two series of Notes, and the 2018 Base Indenture, along with a supplemental indenture
 7 executed pursuant thereto, governs the two other series of Notes, as set forth in Appendix A.

8 As demonstrated below, the Utility’s rights and obligations as they relate to each of the Notes
 9 are identical in all relevant respects with respect to the Make-Whole Premiums claimed by the
 10 Noteholders.

11 B. The Acceleration Clauses

12 First, all of the Base Indentures specify various “Events of Default” and provide for
 13 acceleration upon the occurrence of certain defaults. Relevant here, Section 9.01(e) of all of the Base
 14 Indentures provides that “the commencement by the [Utility] of a voluntary case or proceeding under
 15 any applicable federal or state bankruptcy, insolvency, reorganization or other similar law” constitutes
 16 an Event of Default. Ex. 1 § 9.01(e); Ex. 5 § 9.01(e); Ex. 6 § 9.01(e).

17 Section 9.02 of the Base Indentures has two separate provisions for the acceleration of the
 18 Notes upon the occurrence of an Event of Default (the “**Acceleration Clauses**”), as follows:

19 If an Event of Default shall have occurred and be continuing, then in
 20 every such case the Trustee or the Holders of not less than thirty-three
 21 percent (33%) in aggregate principal amount of Bonds then

22 All references to “Ex.” or “Exhibit” herein refer to exhibits attached to the *Declaration of Theodore*
E. Tsekerides in Support of Debtors’ Moving Brief Regarding Utility Funded Debt Claims’
Entitlement to Make-Whole Premiums, dated November 27, 2019.

23 ⁶ For example, the 6.25% Notes due March 1, 2039 were established by the Sixth Supplemental
 24 Indenture dated March 6, 2009 (attached as Exhibit 2); the 3.50% Notes due October 1, 2020 were
 25 established by the Tenth Supplemental Indenture dated September 15, 2010 (attached as Exhibit
 26 3); and the 3.40% Notes were established by the Twenty-Third Supplemental Indenture dated
 27 August 18, 2014 (attached as Exhibit 4). California law governs the Notes issued under the 2005
 28 Base Indenture and related Supplemental Indentures. Ex. 1 § 1.12; Ex. 2, at A-9; Ex. 3, at A-9;
 Ex. 4, at A-9.

7 ⁷ New York law governs the Notes issued under the 2017 and 2018 Base Indentures and the related
 supplemental indenture.

Outstanding, considered as one class, may declare the principal amount (or, if any of the Bonds are Discount Bonds, such portion of the principal amount of such Bonds as may be specified in the terms thereof as contemplated by Section 3.01) of all Bonds then Outstanding to be due and payable immediately, by a notice in writing to the Company (and to the Trustee if given by Holders), and **upon such declaration such principal amount . . . together with premium, if any, and accrued interest, if any, thereon, shall become immediately due and payable; provided, however, that with respect to an Event of Default described in Section 9.01(d) or (e), the principal amount . . . of all Bonds then Outstanding shall be due and payable immediately without further action by the Trustee or Holders.**

Ex. 1 § 9.02; Ex. 5 § 9.02; Ex. 6 § 9.02 (emphasis added in each). This emphasized language is significant, as it draws a distinction between (i) general Events of Default, as to which acceleration occurs only upon a declaration of the indenture trustee or holders of 33% of outstanding principal amount of Notes, and (ii) Events of Default under Sections 9.01(d) or (e), as to which acceleration occurs automatically upon a voluntary bankruptcy filing (or with the passage of time after an involuntary bankruptcy filing). Significantly, as set forth above, acceleration for the first category of defaults requires payment of principal “together with premium, if any” while the second category of defaults requires only payment of “principal” without a reference to a “premium.”

Additionally, the Acceleration Clauses cause the Notes to “mature.” The Base Indentures define the term “Maturity” as “the date on which the principal of such [Note] . . . becomes due and payable . . . whether at the Stated Maturity, by declaration of acceleration, upon call for redemption or otherwise.” Ex. 1 § 1.01; Ex. 5 § 1.01; Ex. 6 § 1.01. The Base Indentures define “Stated Maturity” to mean “the date on which the principal of such obligation or such installment of principal or interest is stated to be due and payable (without regard to any provisions for redemption, prepayment, acceleration, purchase or extension).” Ex. 1 § 1.01; Ex. 5 § 1.01; Ex. 6 § 1.01. Thus, a Note may reach Maturity at its Stated Maturity Date (e.g., March 1, 2034, for the 6.05% Notes), or upon the earlier acceleration of outstanding principal resulting from an Event of Default, such as a bankruptcy filing.

C. The Optional Redemption Provisions

Each of the Indentures has an “Optional Redemption” provision (the “**Optional Redemption Provision**”), that allowed the Utility to redeem the Notes before their maturity by paying a

1 “Redemption Price.” For each Note, the Redemption Price is the greater of: (i) 100% of the principal
 2 amount of the Note to be redeemed (commonly referred to as the Note’s “face value”); or (ii) the
 3 present value of “Remaining Scheduled Payments,”⁸ which includes future payments of interest and
 4 principal of the Note to be redeemed, discounted to the “Redemption Date” at the “Adjusted Treasury
 5 Rate,” plus 15 to 25 basis points. *See, e.g.*, Ex. 1 § 4.03(d). For purposes of this Memorandum and
 6 the current dispute, the term “**Make-Whole Premiums**” refers to the amount by which the
 7 Redemption Price exceeds the face value of the Note.

8 The 2005 Base Indenture, for example, provides that the Utility had the option of redeeming
 9 the 6.05% Notes:

10 in whole or in part at any time after the Initial Issuance Date and prior
 to Maturity, at a Redemption Price equal to the greater of:

11 (i) 100% of the principal amount of the 6.05% Senior Notes to be
 redeemed; or

12 (ii) as determined by the Independent Investment Banker, the sum
 of the present values of the Remaining Scheduled Payments on the
 6.05% Senior Notes to be so redeemed (not including any portion of
 such payments of interest accrued to the Redemption Date)
 discounted to the Redemption Date on a semi-annual basis
 (assuming a 360-day year consisting of twelve 30-day months) at
 the Adjusted Treasury Rate, plus 0.25%,

13 plus, in either of the above cases, accrued and unpaid interest on the
 principal amount of the 6.05% Senior Notes being redeemed to but not
 including the Redemption Date.

14 Ex. 1 § 4.03(d). Assuming, *arguendo*, that the 6.05% Notes were deemed to be “redeemed” under the
 15 Debtors’ Plan on June 30, 2020, the Redemption Price would include the present value of the twenty-
 16 seven remaining interest payments, plus the present value of the principal. In this scenario, the
 17 Redemption Price for the 6.05% Notes would be approximately \$4.39 billion (calculated as if the
 18 principal had not been accelerated), resulting in a Make-Whole Premium of almost \$1.4 billion for the
 19 6.05% Notes alone.⁹

20 ⁸ “Remaining Scheduled Payments” is a defined term used in all of the Indentures, with the
 21 exception of the 2018 Base Indenture and the first supplemental indenture thereto.

22 ⁹ The actual amount of the Make-Whole Premiums may vary, subject to the actual Redemption Date,
 23 if any, and the applicable Adjusted Treasury Rate. This Memorandum uses June 30, 2020, as the
 24 Redemption Date and the Adjusted Treasury Rate as of November 25, 2019, as proxies for
 25 illustrative and explanatory purposes only. Nothing in this Memorandum or its accompanying

1 Each of the Notes are subject to similar Optional Redemption Provisions, although the phrasing
 2 varies slightly. As noted above, Section 4.03(d) of the 2005 Base Indenture provides that the 6.05%
 3 Notes are redeemable “at any time after the Initial Issuance Date and *prior to Maturity.*” Ex. 1 §
 4 4.03(d) (emphasis added). Certain Supplemental Indentures provide that the Notes are redeemable “at
 5 any time,” *see, e.g.*, Ex. 2 § 301, although the Notes to be issued pursuant thereto still state that they
 6 are redeemable “prior to Maturity,” *see, e.g.*, Ex. 2, at A-6. Other Supplemental Indentures provide
 7 that the Notes are redeemable “at any time prior to [a specific date].” *See, e.g.*, Ex. 3 § 301; Ex. 4 §
 8 301. While the exact phrasing of the Optional Redemption Provisions varies among the Indentures,
 9 they all uniformly address circumstances where the Notes are voluntarily paid off before the principal
 10 outstanding on the Notes is due, *i.e.*, before maturity of the Notes.

11 **IV. NO MAKE-WHOLE PREMIUMS ARE DUE UNDER THE INDENTURES**

12 The Debtors’ Plan compensates the Noteholders in full for their allowed Utility Funded Debt
 13 Claims in respect of the Notes. As stated, under the Debtors’ Plan, the Noteholders will receive the
 14 principal amount of their Notes plus all accrued and unpaid interest that was owed as of the Petition
 15 Date, plus postpetition interest at the Federal Judgment Rate. *See* Debtors’ Plan § 4.16(a). The
 16 Noteholders contend that they also are entitled to Make-Whole Premiums calculated with reference to
 17 the Optional Redemption Provision in the applicable Indentures. As demonstrated below, under both
 18 the terms of the relevant Indentures as well as the operation of law under section 502(b)(2) of the
 19 Bankruptcy Code, the Noteholders have no allowable claims in respect of the Make-Whole Premiums.

20 A. Legal Standard

21 In order to have an allowable claim in bankruptcy, a party must first have a valid and
 22 enforceable obligation under nonbankruptcy law. 11 U.S.C. § 502(b)(1) (disallowing claim to the
 23 extent “unenforceable against the debtor and property of the debtor, under any agreement or applicable
 24 law for a reason other than because such claim is contingent or unmatured”); *see also Hotel Mgmt. &*
25 Assocs., Inc. v. Hansen, Hansen & Johnson, 902 F.2d 39 (9th Cir. 1990) (claim properly disallowed
 26 under section 502(b)(1) where creditors’ “rights to demand payment under the . . . contracts depended

27 28 submissions should be interpreted as a waiver or concession as to the Noteholders’ entitlement to
 any Make-Whole Premiums under any of the Notes or Indentures at issue.

1 on the occurrence of two conditions precedent,” neither of which had occurred); *In re Ritter Ranch*
 2 *Dev., L.L.C.*, 255 B.R. 760, 766 (B.A.P. 9th Cir. 2000) (claim properly disallowed where bondholders
 3 had no contractual right to payment from the debtor).

4 Independently, the party’s claim also must not be subject to disallowance under the various
 5 provisions of the Bankruptcy Code. *See Travelers Cas. & Sur. Co. of Am. V. Pac. Gas & Elec. Co.*,
 6 549 U.S. 443, (2007) (“[c]reditors’ entitlements in bankruptcy arise in the first instance from the
 7 underlying substantive law creating the debtor’s obligation, *subject to any qualifying or contrary*
 8 *provisions of the Bankruptcy Code*”) (emphasis added); *In re Ultra Petroleum Corp.*, No. 17-20793,
 9 2019 WL 6318074, at *2 (5th Cir. Nov. 26, 2019) (following “the monolithic mountain of authority
 10 holding the Code—not the reorganization plan—defines and limits the claim.”); *In re PPI Enters.*
 11 (*U.S.*), Inc., 324 F.3d 197, 207 (3d Cir. 2003) (“creditor’s rights must be ascertained with regard to
 12 applicable statutes,” including the Bankruptcy Code).

13 **B. The Noteholders Have No Contractual Right To Make-Whole Premiums**

14 Under both California and New York law, the Indentures are to be interpreted according to
 15 their plain meaning. *See Cal. Civ. Code §§ 1638, 1639; Bank of the W. v. Superior Court*, 2 Cal. 4th
 16 1254, 1264 (1992) (“If contractual language is clear and explicit, it governs.”); *see also Quadrant*
 17 *Structured Prod. Co. v. Vertin*, 23 N.Y.3d 549, 559–60 (2014) (“In construing a contract we look to
 18 its language, for ‘a written agreement that is complete, clear and unambiguous on its face must be
 19 enforced according to the plain meaning of its terms.’”) (citing cases). The plain language of the
 20 Indentures clearly and explicitly demonstrates that the Noteholders are not entitled to Make-Whole
 21 Premiums as part of their Utility Funded Debt Claims.

22 1. The Optional Redemption Provisions Cannot Give Rise To Make-Whole Premiums 23 After A Chapter 11 Filing

24 The Noteholders are likely to contend that payment of Utility Funded Debt Claims under the
 25 Debtors’ Plan triggers the Optional Redemption Provisions, thereby entitling them to the Make-Whole
 26 Premiums. But there are no Make-Whole Premiums due under the Optional Redemption Provisions—
 27 and there never will be—because the Notes have reached maturity, thus rendering the Optional
 28 Redemption Provisions inoperative.

1 The Optional Redemption Provisions were designed to provide the Utility the flexibility to
 2 repay before maturity and when to make such payments, provided it followed the specific terms and
 3 paid the pre-negotiated premium in exchange for its exercise of that right. Under the Indentures, the
 4 Utility, therefore, had the right to voluntarily elect to pay some or all of the Notes early, if it paid the
 5 Make-Whole Premiums. Based on the plain language of the Optional Redemption Provisions,
 6 however, the Make-Whole Premiums only become payable if the Utility makes a voluntary election
 7 to pay off some or all of the outstanding debt *before* the applicable maturity date. In contrast, *after*
 8 maturity, the Utility is obligated to repay all of the debt under the terms of the Indentures—payment
 9 no longer is optional—and it therefore makes perfect sense that no such premiums would be payable.

10 Under Section 9.02 of the Base Indentures, the entire principal amount of the Notes
 11 automatically became immediately due and payable when the Debtors filed their chapter 11 petitions.
 12 See Ex. 1 § 9.02; Ex. 5 § 9.02; Ex. 6 § 9.02. The chapter 11 filing accelerated all of the various dates
 13 when the Notes were otherwise set to mature to the Petition Date. Under the Indentures, each Note
 14 reaches Maturity at “the date on which *the principal* of such [Note] . . . *becomes due and payable* as
 15 provided in such [Note] or in this Indenture, whether at the Stated Maturity, by declaration of
 16 acceleration, upon call for redemption or otherwise.” Ex. 1 § 1.01; Ex. 5 § 1.01; Ex. 6 § 1.01 (emphasis
 17 added). The Indentures explicitly provide that, upon a bankruptcy filing, “the principal amount of all
 18 Bonds then Outstanding shall be due and payable immediately without further action by the Trustee
 19 or the Holders.” Ex. 1 § 9.02; Ex. 5 § 9.02; Ex. 6 § 9.02. Thus, because the principal of the Notes
 20 automatically became due and payable on the Petition Date, the Notes have reached Maturity.

21 Consistent with this contractual language, courts applying New York and California law have
 22 recognized that acceleration “changes the date of maturity of the accelerated notes to the date of the
 23 petition.” See, e.g., *Matter of MPM Silicones, L.L.C.*, 874 F.3d 787, 802 (2d Cir. 2017) (citation
 24 omitted); *In re AMR Corp.*, 730 F.3d 88, 103 (2d Cir. 2013) (“[A]cceleration changed the date of
 25 maturity from some point in the future to an earlier date based on the debtor’s default under the
 26 contract.”) (quotation omitted); *In re Solutia Inc.*, 379 B.R. 473, 489 (Bankr. S.D.N.Y. 2007)
 27 (“Acceleration occurred under the clause [as a result of the chapter 11 filing] and has altered the
 28 maturity or ‘due’ date, as also provided by New York law.”); *Burrill v. Robert Marsh & Co.*, 138 Cal.

1 App. 101, 106 (Cal. Ct. App. 1934) (rejecting argument that maturity could only be construed to mean
 2 the due date specified in the note, and concluding “that the term ‘maturity,’ as here used, should be
 3 construed to mean the date when the holder of the notes had a legal right to begin action to force
 4 payment thereof”).

5 This is important because the Indentures make clear that an Optional Redemption can only
 6 occur prior to the Maturity of the Notes. That has not occurred, and cannot occur here. Simply put,
 7 if a redemption does not take place prior to Maturity, there can be no event post-maturity that triggers
 8 a Make-Whole Premium. Although the Notes do not define “redemption,” the term, as used in the
 9 finance industry, customarily means the “repayment of a debt security or preferred stock issue, *at or*
 10 *before maturity.*”¹⁰ Barron’s Dictionary of Finance and Investment Terms 587 (8th ed. 2010)
 11 (emphasis added); *see also* Encyclopedia of Banking & Finance 933 (9th ed. 1991) (“redemption” is
 12 “[t]he act of redeeming a debt; payment of a debt; retirement of an issue of bonds or notes; the
 13 cancellation of a debt, whether on a date prior to maturity or upon the date of obligatory maturity”).

14 Because “redemption” can only occur “*at or before maturity*,” “any payment on the
 15 accelerated notes following a bankruptcy filing would be a *post-maturity* payment,” and not a
 16 redemption of the Notes. *MPM Silicones*, 874 F.3d at 803; *see AMR*, 730 F.3d at 103 (“American’s
 17 attempt to repay the debt in October 2012 was not a voluntary prepayment because prepayment can
 18 only occur *prior* to the maturity date.”) (quotation omitted); *Solutia*, 379 B.R. at 488 (“Because the
 19 2009 Notes were automatically accelerated, any payment [after the chapter 11 filing] would not be a
 20 prepayment. Prepayment can only occur prior to the maturity date.”); *Tan v. California Fed. Sav. &*
 21 *Loan Assn.*, 140 Cal. App. 3d 800, 809 (Ct. App. 1983) (“[Lender] having exercised the due-on-sale
 22 clause, accelerated the due date of the loan and demanded full payment, the entire unpaid balance was
 23 due under the terms of the note itself and there was no prepayment to which the prepayment penalty
 24 would attach.”). Thus, because the Utility’s chapter 11 filing automatically caused the Notes to mature
 25 and to become due and payable on the Petition Date, any “Redemption” became impossible, and the
 26

27
 28 ¹⁰ Cal. Civ. Code § 1645 (“Technical words are to be interpreted as usually understood by persons
 in the profession or business to which they relate, unless clearly used in a different sense.”)

1 right to any Make-Whole Premiums as a consequence of an optional redemption was immediately
 2 extinguished.

3 Despite this plain contractual language, the Noteholders are likely to rely on the Third Circuit's
 4 decision in *In re Energy Future Holdings Corp.*, 842 F.3d 247, 255 (3d Cir. 2016) ("EFH"), where
 5 the Court stated that "New York and federal courts deem 'redemption' to include both pre- and post-
 6 maturity repayments of debt." Any such reliance, however, would be misplaced. First, *EFH* confirms
 7 that where, as here, the contractual language is clear, the Court need only "follow the text." *Id.* at 256
 8 ("AMR is the easy case; just follow the text."). Second, the *EFH* Court reached its conclusion without
 9 analysis, and the cases it relied on do not support the conclusion. For instance, the *EFH* Court relied
 10 on *Chesapeake Energy Corp. v. Bank of N.Y. Mellon*, 773 F.3d 110, 116 (2d Cir. 2014), but the issue
 11 in *Chesapeake* was whether "redeem" meant the reacquisition of a security or the giving of notice of
 12 redemption—the Court did not address whether redemption could occur post-maturity. In fact, the
 13 Second Circuit in *Chesapeake* quoted Barron's Dictionary of Finance and Investment Terms 587 (8th
 14 ed. 2010) for the definition of "redemption" as "repayment of a debt security or preferred stock issue,
 15 *at or before maturity.*" *Id.* (emphasis added). The other cases cited in *EFH* are similarly unavailing,
 16 as none analyze a borrower's ability to take advantage of an optional redemption provision after the
 17 debt had been accelerated. *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 388 (3d
 18 Cir. 2012) (addressing government regulations allowing owners of United States Savings Bonds to
 19 redeem the bonds after their stated maturities), and *Fed. Nat. Mortg. Ass'n v. Miller*, 473 N.Y.S.2d
 20 743, 744 (Sup. Ct. Nassau Cty. 1984) (noting the rule in New York that a mortgagor may cure a default
 21 by paying the accelerated debt prior to sale of the property).

22 Moreover, the Second Circuit has confirmed that the "plain meaning of the term 'redeem' is
 23 to 'repay[] . . . a debt security . . . *at or before maturity,*'" *see MPM Silicones*, 874 F.3d at 803 (citation
 24 omitted); *see also AMR*, 730 F.3d at 103 (no make-whole premium is payable after bankruptcy petition
 25 date because "[p]repayment can only occur *prior* to the maturity date"); *Tan*, 140 Cal. App. 3d at 809–
 26 10 (finding no prepayment penalty warranted after lender "accelerated the due date of the loan" and
 27 demanded full payment).

1 Finally, the Optional Redemption Provisions themselves say nothing about payment of a
 2 Make-Whole Premium after a bankruptcy. This is telling, because courts have required explicit
 3 indenture language before concluding that noteholders are entitled to such a premium. *See, e.g.*,
 4 *Solutia*, 379 B.R. at 488 (no make-whole was due where redemption provision lacked “the explicitness
 5 that would be expected in a typical post-acceleration yield-maintenance clause”) (citation omitted).

6 2. Other Indenture Provisions Confirm That The Make-Whole Premiums Are Not
 7 Payable

8 Other provisions in the Indentures support the conclusion that no Make-Whole Premiums are
 9 payable in the context of a chapter 11 case.

10 As noted above, the Acceleration Clauses draw a sharp distinction between an event of default
 11 based on a bankruptcy filing and those based on other events. Section 9.02 of the Base Indentures
 12 expressly states that upon the occurrence of an Event of Default relating to bankruptcy, “the principal
 13 amount shall be due and payable immediately.” In contrast, for other Events of Default the Trustee or
 14 a class of Holders “may declare” the Notes due and payable, including the “principal amount (or
 15 specified amount), *together with premium, if any.*” *See* Ex. 1 § 9.02; Ex. 5 § 9.02; Ex. 6 § 9.02. This
 16 was a sensible and logical bargain for the parties to strike. “[T]he automatic acceleration provision
 17 here is not solely for the benefit of one party, but simultaneously affords potential benefits to both: it
 18 accelerates the amount presently due for the purpose of the [N]oteholders’ claims against [the Utility]
 19 in bankruptcy and it excludes any Make-Whole [Premiums] from [the Utility]’s obligations, to [the
 20 Utility]’s benefit.” *See AMR*, 730 F.3d at 101.

21 Of course, the Noteholders could have negotiated provisions that expressly provided for a
 22 premium in the event of a Utility bankruptcy,¹¹ but no such right appears in the Indentures. It is clear
 23 from this omission of any reference to “premium” in the Acceleration Clauses in the context of a
 24 bankruptcy that no premium is payable upon the Utility’s chapter 11 filing. *See Quadrant Structured*
 25

26 ¹¹ *See, e.g., HSBC Bank*, 2010 WL 3835200, at *4 (recognizing that parties can contract for damages
 27 in the event of acceleration) (citing cases); *Solutia*, 379 B.R. at 488 (“It is possible to provide
 28 contractually for post-acceleration ‘yield maintenance’ of some sort.”). Of course, this assumes
infra IV.C.

1 *Prod.*, 23 N.Y.3d at 560 (“Even where there is ambiguity, if parties to a contract omit terms—
 2 particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that
 3 the parties intended the omission.”); *see also In re Linn Energy, L.L.C.*, 927 F.3d 350, 354–55 (5th
 4 Cir. 2019) (finding that the “failure to make specific mention of ‘default interest’ . . . indicates that the
 5 parties intended the omission”) (New York law); *Cortlandt St. Recovery Corp. v. Bonderman*, 31
 6 N.Y.3d 30, 46 (2018) (“If the parties to the indenture intended to limit the trustee to actions against
 7 the issuer and guarantor only—as defendants maintain—the signatories to the indenture could have
 8 easily said so. They did not.”); *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763–64 (2001)
 9 (reading omitted term into contract “would violate the fundamental principle that in interpreting
 10 contracts . . . courts are not to insert what has been omitted”) (citing Cal. Civ. Proc. Code § 1858 (in
 11 construing instrument, “the office of the Judge is simply to ascertain and declare what is in terms or
 12 in substance contained therein, not to insert what has been omitted”)).

13 Viewed as a whole, the terms of the Indentures demonstrate that the Noteholders did not
 14 bargain for the right to receive any Make-Whole Premiums in a Utility bankruptcy case. Rather, the
 15 language of the Indentures demonstrates that the Noteholders “made a decision to give up their future
 16 income stream in favor of having an immediate right to collect their entire debt.” *See Solutia*, 379
 17 B.R. at 488; *see also In re Tenderloin Health*, No. 15-CV-01173-JSW, 2015 WL 7015559, at *2 (N.D.
 18 Cal. Nov. 12, 2015) (affirming Bankruptcy Court’s finding that “bankruptcy proceedings clause served
 19 to define the scope of actions” to which the creditor “would be entitled”). No matter how much the
 20 Noteholders might now wish they could redraft their contractual arrangements, they are not entitled to
 21 receive more than what they bargained for or what the Bankruptcy Code allows. *See Solutia*, 379 B.R.
 22 at 489 (“The time and place to have obtained the additional rights the 2009 Noteholders seek was at
 23 the bargaining table.”); *see also In re Yates Dev., Inc.*, 256 F.3d 1285, 1290 (11th Cir. 2001) (“[I]t is
 24 never the role of a . . . court to rewrite a contract to make it more reasonable for one of the parties or
 25 to relieve a party from what turns out to be a bad bargain.”).

1 **C. Section 502(b)(2) Of The Bankruptcy Code Disallows The Make-Whole
2 Premiums As Unmatured Interest**

3 Even if the Indentures themselves provided for payment of Make-Whole Premiums after the
4 Utility's chapter 11 filing, any claim for such premiums nevertheless would be disallowed as
unmatured interest under section 502(b)(2) of the Bankruptcy Code.

5 1. The Make-Whole Premiums Are "Unmatured Interest"

6 The Make-Whole Premiums are based upon and calculated pursuant to interest payments on
7 the Notes scheduled to be made after the Petition Date. As shown below, those future installments of
8 interest are the very essence of claims disallowed by section 502(b)(2) of the Bankruptcy Code. The
9 fact that those unmatured interest payments arise under the "Redemption Price" formula is irrelevant,
10 as the scope and intent of section 502(b)(2) cannot be so easily evaded.

11 Courts look to substance over form, discarding labels to consider whether a claim actually *is*
12 unmatured interest. *See, e.g., Thrifty Oil Co. v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 322 F.3d 1039,
13 1047 (9th Cir. 2003) ("In deciding whether a claim includes unmatured interest, federal courts
14 generally focus on the substance of the claim, not its form, and may rely on evidence outside the
15 parties' agreement."); *see also In re Chateaugay Corp.*, 961 F.2d 378, 380 (2d Cir. 1992) (claims for
16 unamortized original issue discount are, "as a matter of economic definition," claims for "unmatured
17 interest"); *In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014) ("[C]ourts
18 look to the economic substance of the transaction to determine what counts as interest.").

19 a. The Make-Whole Premiums Are The Economic Equivalent Of Interest

20 For each of the Notes, the Make-Whole Premiums are calculated by subtracting the Notes'
21 face value from "the sum of the present values of the Remaining Scheduled Payments" of principal
22 and interest on the Notes to be redeemed, not including principal and interest accrued as of the
23 Redemption Date, with the sum "discounted to the Redemption Date" on a semi-annual basis at the
24 Adjusted Treasury Rate, plus 15 to 25 basis points. *See supra* at III.3. The Make-Whole Premiums
25 thus capture the value of the interest payments that would have become due and payable in respect of
26 the Notes had there been a voluntary payment prior to maturity—rendered impossible by the Utility's
27 chapter 11 filing. As such, the Make-Whole Premiums are no different from the make-whole,
28 prepayment, redemption, and "yield maintenance" premiums that courts have disallowed as unmatured

interest under section 502(b)(2) of the Bankruptcy Code. See *HSBC Bank USA v. Calpine Corp.*, No. 07 CIV 3088 GBD, 2010 U.S. Dist. LEXIS 96792 (S.D.N.Y. Sep. 14, 2010); *Doctors Hosp. of Hyde Park*, 508 B.R. at 706; *In re Ridgewood Apartments of DeKalb Cty., Ltd.*, 174 B.R. 712, 720-21 (Bankr. S.D. Ohio 1994).

Courts have recognized that, despite their label, yield maintenance formulas, original issue discounts, and make-whole, no-call, or redemption premiums or penalties all operate with a common goal: to compensate a lender for anticipated interest payments that would accrue in the future. *See, e.g., Matter of LHD Realty Corp.*, 726 F.2d 327, 330 (7th Cir. 1984) (a prepayment premium compensates for “anticipated interest a lender will not receive if a loan is paid off prematurely”); *Doctors Hosp. of Hyde Park*, 508 B.R. at 705 (yield maintenance premium “compensates the lender for possible changes in the interest rate in the future, and is thus part of the price of the money loaned now in terms of money to be paid back in the future”); *In re Skyler Ridge*, 80 B.R. 500, 504–05 (Bankr. C.D. Cal. 1987) (“The usual purpose of a prepayment premium provision in a loan agreement is to assure that the lender will receive the contractual rate of return for the life of the loan, or the equivalent thereof.”).¹²

Allowing Noteholders to recover Make-Whole Premiums here would be no different than allowing them a claim for interest payments over the life of the Notes, a result indisputably prohibited by section 502(b)(2).

b. *The Make-Whole Premiums Were Unmatured On The Petition Date*

In *Thrifty Oil*, the Ninth Circuit held that “[i]nterest is ‘unmatured’ when it [is] not yet due and payable at the time the debtor filed its bankruptcy petition.” *Thrifty Oil*, 322 F.3d at 1047 (citation and footnote omitted). The Make-Whole Premiums here are *unmatured* interest because they were not due and payable on the Petition Date. Rather, because the Utility did not redeem any of the Notes

¹² The *Skyler Ridge* court also noted in dicta that “[l]iquidated damages, including prepayment premiums . . . do not represent unmatured interest.” *Skyler Ridge*, 80 B.R. at 508 (Bankr. C.D. Cal. 1987). This is wrong for all the reasons stated above, and not instructive to the Court’s analysis of the issue here. In fact, the Court in *Skyler Ridge* only characterized the prepayment premium as liquidated damages because “the parties had agreed upon” it, and, even then, recognized that “[t]he classification of the prepayment premium language as a liquidated damages provision is not altogether certain.” *Id.* at 503.

1 prior to the commencement of its chapter 11 case, it is not possible for any claims for Make-Whole
 2 Premiums to have accrued prior to the Petition Date.

3 Courts consistently have held that make-whole premiums that accrue after the petition date are
 4 unmatured interest. In *Ridgewood Apartments*, for example, the debtor paid notes after a bankruptcy
 5 filing. *See* 174 B.R. at 720. The court held that, “[a]bsent actual prepayment by the [d]ebtor, [the
 6 creditor’s] claim for a prepayment penalty could be no more than a contingent liability” and, “because
 7 the contingent claim is for interest *which is not yet due at the time the bankruptcy was filed (because*
 8 *prepayment had not occurred)*, it would not be allowed to an under-secured creditor.” *Id.* (emphasis
 9 added); *see also Doctors Hosp.*, 508 B.R. at 706 (“At the time the [debtor’s] bankruptcy case was
 10 filed, the Yield Maintenance Premium was not due, and thus the interest was still unmatured.”); *HSBC*
 11 *Bank*, 2010 U.S. Dist. LEXIS 96792 (disallowing “claim for damages equal to the full amount of
 12 interest due over the life of the loans, but not yet due as of the petition date” because the “amount was
 13 unmatured when Debtor filed for bankruptcy, and therefore [could] not be recovered”).

14 Thus, because the Make-Whole Premiums consist of future interest payments that were not yet
 15 due and payable on the Petition Date, the Make-Whole Premiums constitute unmatured interest that is
 16 not permitted as part of an allowed claim under section 502(b) of the Bankruptcy Code.

17 2. The Debtors’ Solvency Is Not A Basis To Ignore Section 502(b)(2)

18 The Noteholders may cite pre-Bankruptcy Code case law in support of a “solvent debtor
 19 exception” to section 502(b)(2) of the Bankruptcy Code. But the solvent debtor exception is a relic of
 20 the past. Under the Bankruptcy Code, section 502(b)(2) applies with full force regardless of a debtor’s
 21 solvency, and the Bankruptcy Code contains no provision exempting the creditors of a solvent debtor
 22 from the provisions of section 502(b).

23 The Noteholders might argue that the solvent debtor exception survived the Code’s enactment.
 24 Any such argument, however, is unavailing, as Congress has spoken on the Code’s treatment of both
 25 unmatured interest and solvent debtors. When Congress enacted the Bankruptcy Code, it specifically
 26 prohibited in section 502(b)(2) the allowance of claims for unmatured interest and established two
 27 narrow exceptions: (i) section 506(b), which allows a secured claim for postpetition interest where
 28 the value of collateral exceeds the allowed amount of the claim, *see Timbers*, 484 U.S. at 372; and

1 (ii) section 726(a)(5), which provides for recovery of postpetition interest *on*, but not as *part of*, an
 2 allowed claim at a specified “legal rate” when the debtor is solvent. *See* 11 U.S.C. § 726(a)(5); *In re*
 3 *Cardelucci*, 285 F.3d 1231, 1234-35 (9th Cir. 2002); *In re Robinson*, 567 B.R. 644, 649-50 (Bankr.
 4 N.D. Ga. 2017) (“Post-petition interest is not part of the allowed claim pursuant to Section 502(b)(2),
 5 but the Code provides when and at what rate that post-petition interest can be paid on the allowed
 6 claim pursuant to Section 726(a)(5).”). By enacting section 726(a)(5), Congress replaced the pre-
 7 Code solvent debtor exception with something entirely new. Under these circumstances, where
 8 Congress has specified these two narrow exceptions when a creditor may recover postpetition interest,
 9 there is no basis to conclude that the amorphous pre-Code solvent debtor exception has any vitality
 10 under the Bankruptcy Code.

11 Moreover, even *if* the solvent debtor exception survived Congress’s enactment of section
 12 502(b)(2), which it clearly did not, that exception still would provide no basis for including the Make-
 13 Whole Premiums as part of an allowed claim in respect of the Notes. While the common law exception
 14 allowed interest to continue accruing against a solvent debtor *during* bankruptcy, it did not allow
 15 interest to continue accruing *after* bankruptcy. But that is precisely what the Make-Whole Premiums
 16 seek to accomplish. The Optional Redemption Provisions require the Debtors to pay the present value
 17 of *all* future interest payments, consisting in many instances of interest payments that will not come
 18 due for more than twenty years from now. This would go well beyond what the pre-Code solvent
 19 debtor exception permitted, even if by some means that exception still has any relevance.

20 **V. CONCLUSION**

21 For all the foregoing reasons, the Court should find that the Noteholders are not entitled to any
 22 Make-Whole Premiums as part of their Allowed Utility Funded Debt Claims.

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